

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

ORIGINAL

In the Matter of)

)
Amendment of Part 95 of the Commission's)
Rules To Provide Regulatory Flexibility)
in the 218-219 MHz Service)

WT Docket No. 98-169
RM-8951

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COMMENTS OF
RAND McNALLY & COMPANY

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Rand McNally & Company ("RMC") hereby submits the following comments to the Commission in response to the Notice of Proposed Rulemaking portion of the above-captioned proceeding.¹ More particularly, RMC asks the Commission to modify its proposed partitioning rules so as not to invite licensees in the 218-219 MHz Band (the "218-219 MHz Band") to make unauthorized use of RMC's proprietary MTA or BTA Listings.² Said use would constitute an infringement of RMC's copyright, both directly by the Commission's use, and indirectly by encouraging licensees in the 218-219 MHz Band to infringe on RMC's property right.

I. DISCUSSION: THE COMMISSION MAY NOT USE THE MTA/BTA LISTINGS
FOR LICENSING THE 218-219 MHZ BAND WITHOUT RMC'S CONSENT.

As the Commission has recognized, RMC is the copyright owner of the MTA/BTA Listings.³ Neither the Commission nor any of its licensees may make use of the MTA/BTA geographic boundaries in connection with the licensing or use of the 218-219 MHz Band without RMC's consent.

Yet, despite RMC's considerable copyright interest in its MTA and BTA Listings and the lack of any agreement or grant of permission to the FCC or anyone else to use these Listings for licensing in the 218-219 MHz Band, the Commission's proposed partitioning rules for the 218-219 MHz Band could make use of the MTA

¹ Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 98-169, FCC 98-228 (released September 17, 1998) (the "Notice").

² Notice, Proposed § 95.823(b)(1).

³ See, e.g., Report and Order and Second Notice of Proposed Rule Making, Amendment of Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Band, 12 FCC Rcd. 18600, 18610 n.32 (1997) ("39 GHz Order"); Report and Order, Amendment of Parts 21 and 74 of the Commission Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, 10 FCC Rcd. 9589, 9608 (1995) ("MDS Order").

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and BTA Listings and encourage Commission licensees to do as well. See note 2, supra. The Commission's Notice does not even attempt to explain the basis upon which the Commission, much less its licensees, might purport to have rights to use RMC's copyrighted MTA and BTA Listings for this purpose, nor could any cogent explanation be offered.

While RMC has, with the Commission's knowing encouragement, entered into licensing agreements for the use of MTA/BTA Listings in connection with the licensing of other services, the licensing agreements under which the Commission (and others) have been issued authority to employ the MTA/BTA Listings have been clearly limited to specific licensed services and frequency bands and specifically do not include 218-219 MHz Band licensees. These agreements do not in any way permit or suggest that these Listings may be used by the Commission or its licensees for other services, a limitation that the Commission has recognized on several occasions.⁴

Accordingly, proposed Section 90.823(b)(1) of the Commission's rules regarding partitioning in the 218-219 MHz Band, should be modified so as not to purport to authorize licensees to use the MTA/BTA Listings for partitioning, at least in the absence of a license agreement with RMC that authorizes such use.

There is already precedent for the Commission's making the proposed rule change. Thus, comparable language to that which now appears in proposed Section 90.923(b)(1) was originally adopted by the Commission for its rule (Section 90.365(b)) governing the partitioning of AVM licenses.⁵ Later, however, apparently recognizing the problems of infringement, the Commission modified this provision to delete reference to the MTA/BTA Listings and other "FCC recognized service areas."⁶ That same approach can and should be followed here.⁷

RMC remains willing to license the use of MTA/BTA Listings on reasonable terms, but it will not permit its property to be appropriated without just compensation and due process of law, and will take all necessary steps to remedy any unauthorized exercise of its copyright by the Commission or any other party.

⁴ See, e.g., 39 GHz Order, 18612; MDS Order, 9609.

⁵ Second Report and Order, Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, (July 14, 1998) (the "AVM Order") Appendix C.

⁶ Erratum to AVM Order, supra (July 20, 1998).


⁷ For the avoidance of doubt, while RMC obviously has no objection to partitioning along county lines, RMC would regard any licensee's effort to partition based upon the compilation of counties that are reflected in the MTA/BTA Listings as an infringement.

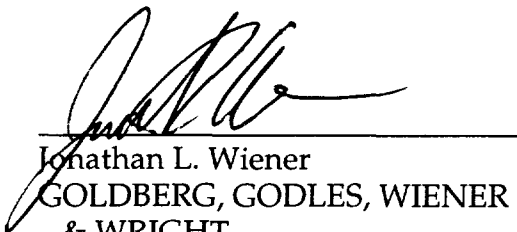
II. CONCLUSION.

The Commission has no right nor authorization to use, or encourage others to use, the MTA/BTA Listings for licensing, initial or subsequent partitioning, of 218-219 MHz Band licenses. Absent a license agreement permitting such use, the Commission should not infringe upon these rights.

Respectfully submitted,

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